Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington DC 20554

In the Matter of:	)	
	)	
Retention by Broadcasters of Program Recordings	)	MB Docket No. 04-232
	)	

TO: The Commission

COMMENTS OF COHN AND MARKS LLP
ON BEHALF OF VARIOUS BROADCAST LICENSEES

Cohn and Marks LLP, a law firm in Washington, DC which has practiced before the Federal Communications Commission for more than 50 years, submits the following comments on the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter on behalf of various broadcast licensees identified in Attachment A.[1] These licensees reflect a representative cross-section of the broadcasting community: radio and television, commercial and non-commercial, large multi-state group owners and statewide networks as well as small station group owners and individual station owners. As more fully explained below, we believe the Commission's proposal to require broadcast licensees to make (and retain for a period of time) recordings of their programming in order to assist the Commission in policing its newly-expanded indecency policies should not be adopted − it is not only poor policy but it is also clearly unconstitutional.

[1] In addition to the clients listed in Attachment A, we have received many expressions of opposition (some more properly characterized as outrage) from many, mostly smaller broadcast licensee clients who chose not to sign on to these Comments. Included in Attachment A are pertinent facts requested by the Commission with respect to the licensees' current practices of voluntarily recording programming and the costs (or estimated costs) of their recording and retention regimen.

The Commission's proposal is premised on the history of its attempts at administrative enforcement of Title 18, Section 1464 of the United States Code, which prohibits the utterance of any "obscene, indecent, or profane" language by means of radio (including television) communication. The Commission notes that "obscene" speech is prohibited at all times but that "indecent" speech has limited First Amendment protection and, therefore, it has prohibited the broadcasting of "indecent" programming during the hours when children are likely to be in the audience, *i.e.*, between the hours of 6:00 a.m. through 10:00 p.m. In the recent *Golden Globe* case, 19 FCC Rcd 4975, at 4981 (2004), the Commission held that "profane" speech should also be prohibited during this same time frame. The Commission has invited comment, however, on whether the proposed "recording/retention" requirement should be adopted *not only* for the restricted hours of 6:00 a.m. through 10:00 p.m., but during *all* hours of the broadcast day, in many cases "24/7."

COMMENTS

The Proposed Recording and Retention Rule Should Not Be Adopted

The Commission first asks whether a recording requirement should be adopted and, if so, how long such recordings must be retained by broadcasters (60 to 90 days is suggested).

Our position is that the proposal to require broadcast licensees to make recordings of all or most of their broadcast programming, particularly in order to assist the Commission in its enforcement of the obscenity/indecency/profanity restrictions of 14 USC § 1464, should be rejected in its entirety. The Commission points to no recent case where its ability to adjudicate a particular complaint was adversely affected by the absence of a recording of the triggering broadcast. Indeed, the Commission recites its own current policy that, if a licensee fails to produce a recording to refute a complaint about broadcast content, the Commission will

generally accept the complainant's allegations as true. Without rehearsing the possible unfairness of this approach, such a system permits each *licensee* to decide, *as a voluntary matter*, whether to undertake or to continue recording of some or all of its program content for possible defensive use.

The Commission appears to have assumed that only a blanket approach to recording and retention has any chance of passing muster as a constitutional matter (but see our comment on this issue below.) Thus, it makes no allowance for a licensee which broadcasts, say, a classical music format, to determine that it need record and retain *only* its occasional "talk/call-in" program, recognizing that it has even less control over the utterances of callers than perhaps of its own host. Religious broadcasters may reasonably question whether they are ever likely to carry any indecent content. Nor does the Commission's proposal distinguish between local and network programming in describing its proposed requirement. Why should the affiliates of NPR be required to record not only "Morning Edition" but also "NPR World of Opera" or, in the case of PBS, not only the "The Newshour with Jim Lehrer" but also "Sesame Street"? These are practical distinctions a *licensee* can make but that the Commission *cannot*, constitutionally, address.

Further, the Commission points out that criminal enforcement of 18 USC § 1464 is a matter for the Department of Justice to administer. Would the licensee − or indeed the Commission itself if it has obtained a copy − be obliged to provide the required recording to the United States Attorney for use in such a prosecution? Compare the criminal defendant's Fifth Amendment right not to incriminate himself − why shouldn't the FCC take a page out of the Constitution and recognize the inherent unfairness of requiring licensees to provide evidence against their interest even in FCC enforcement matters? And, as more fully covered below, the

Commission's current approach to complaints about broadcast content, as recently adjusted, avoids imposing unnecessary burden on complainants and at the same time avoids unconstitutional intrusions into broadcast programming matters.

The Commission Should Not Extend This Proposal To Police Other Areas of Regulatory Concern

The Commission next asks whether the recording requirement should be "crafted" (fine-tuned) to permit its use in enforcement of other Commission rules such as the children's TV commercial limits, sponsorship ID requirements, etc.

For the reasons set forth above (and below), the Commission should *not* (and cannot) adopt this recording/retention proposal. Moreover, the Commission already has record-keeping and filing requirements in place to police, for example, compliance with the children's television programming and commercial-limit requirements. This might be the proper place, also, for us to observe that the recording and retention proposal in the NPRM runs completely counter to the Commission's deregulatory actions in *repealing* the long-standing requirements of program logs for radio and television.[2] Even those logs were designed only to track such things as compliance with commercial limits (which themselves have since been deregulated) and were *never* designed to intrude into the specifics of program content beyond "type" labels which ultimately found their way into a statistical analysis of "news, public affairs and 'other' non-entertainment, non-sports programming," for which performance was to be matched against the licensee's previous promise at license renewal time.

Further, should the Commission extend the proposed recording/retention requirement to police areas beyond "indecency" regulation, it risks failure to justify the imposition of the

[2] See *Deregulation of Radio*, 8 FCC2d 968 (1981), and *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC2d 1075 (1984).

proposed burden on broadcast licensees only. A recording requirement to monitor compliance with the political advertising rules, for example, would necessarily have to be applied also to cable and satellite programmers.

There Is No Longer Any "Burden" on Complainants To Document Their Allegations

The Commission asks whether the adoption of a recording requirement for broadcasters might affect the burden now resting on complainants to submit a "tape, transcript or significant excerpt" of allegedly improper programming to justify a Commission staff inquiry of the licensee.

In its 2001 Policy Statement on Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd 7999, the Commission stated that it would as a "general practice" require complainants to produce a "full or partial tape or transcript or significant excerpts" of broadcast material which was alleged to be improper. In furtherance of that policy, the Commission staff routinely dismissed complaints about programming which failed to provide sufficiently detailed information concerning the actual words and language in the broadcast and the "meaning and context" in which those words and language were used.[3]

More recently, however, the Commission affirmed the imposition of a forfeiture for the broadcast of indecent programming outside the "safe harbor" hours and appeared to make clear that complainants need, at most, provide a credible description of what allegedly objectionable language or action was broadcast and when it occurred. If the licensee cannot in response provide a tape or transcript or sworn statement rebutting the allegations against it, the

[3] Two staff letters, both dated December 11, 2001, illustrate this practice. EB-01-IH-0112-KMS dismissed a complaint concerning allegedly indecent programming on Station KTNQ(AM), Los Angeles, California. Although the licensee in that case routinely recorded, voluntarily, all its programming and retained the recordings for 60 days, the Commission's inquiry to the licensee was not mailed until seven weeks after the recording had been recycled in ordinary course. EB-00-IH-009 dismissed a complaint filed against Station WJFK-FM, Manassas, Virginia; this action provoked a separate Statement by Commissioner Gloria Tristani which characterized the "tape, transcript or significant excerpt" requirement as an "unreasonable burden" on the public.

Commission will then accept the complainant's characterization of the offending material as accurate. See Emmis Radio License Corporation (Station WKXQ(FM), 19 FCC Rcd 6452, released April 8, 2004. Notwithstanding the Commission's express rejection of the licensee's argument that it had improperly shifted the *burden of proof* in indecency cases, there is at least a clear shifting of *emphasis* with respect to the treatment of the licensees' responses from the pre-2001 Policy Statement cases to the Emmis case.

Under the Emmis standard, a licensee which chooses not to *voluntarily* record programming and retain the recordings *for a reasonable period of time*[4] may find itself unable to credibly challenge a complainant's allegations. In these circumstances, there is sufficient impetus for licensees to *voluntarily* record and retain for defensive purposes, thus obviating the need for an intrusive (and unconstitutional) federal requirement.

The Proposed Rule Fails to Pass Constitutional Muster

The Commission asks whether the proposed recording and retention requirement raises any First Amendment issues.

The simple and direct answer is: it certainly does. In 1978, the United States Court of Appeals for the District of Columbia Circuit held, in *Community-Service Broadcasting of Mid-America, Inc. v. Federal Communications Commission,* 593 F.2d 1102 ("*Community-Service*"), that the requirement in former Section 399(b) of the Communications Act of 1934, as amended, which required all noncommercial educational radio and television stations which received

[4] The material which was the subject of the complaint in the Emmis case was allegedly broadcast on March 20 and May 15, 2000 and the complainant's letters regarding these broadcasts were dated March 20 and May 15, 2000. However, the staff's letter of inquiry to the licensee was not sent until November 29, 2000 and the licensee's response was dated January 25, 2001. The licensee stated that it did not have a tape or transcript of the programs involved in the complaint. It is not clear, however, whether the licensee never had a recording or whether the licensee recorded the programs but recycled the recordings before it received the Commission's inquiry, and it is certainly not clear what the Commission's decision might have been had the programs been recorded and the tapes retained for a reasonable period (say, 60-90 days) but then became unavailable because of the long delay in the issuance of the staff's letter of inquiry, as was the case in the KTNQ matter (see note 3 above).

federal funding to make (and retain for 60 days) audio recordings of all broadcasts "in which any issue of public importance is discussed," was unconstitutional under First and Fifth Amendments to the United States Constitution. Although there are a number of *factual* distinctions between the statutory provision under consideration in the *Community-Service* case and the rule proposed in the instant NPRM, *none of those distinctions undercuts the application of the Court's conclusion to this matter:*

- First, the Court mentioned that the general prohibition on government control of programming is the same for both noncommercial and commercial broadcasters.
- Second, public affairs programming (which was the focus of Section 399(b) of the Act and is *included* within the scope of the programming, *i.e.*, *all* programming, which is the object of the rule proposed in the NPRM) "lies at the core" of the First Amendment's protections.
- Third, the Court held that Section 399(b) must be reviewed under the standard of "strict scrutiny" and that standard would certainly also be applied here.
- Fourth, the Court could find no *compelling* government interest in the recording requirement, nor can the Commission find one here.
- Fifth, although, unlike Section 399(b), the rule proposed in the NPRM is *facially* "content neutral," it is admittedly *designed* to address "indecent" (constitutionally protected) programming and would *in fact* have the effect of chilling protected speech; indeed, in its adoption of the noncommercial recording rule pursuant to Section 399(b), the Commission itself expressly chose *not to impose the requirement on commercial broadcasters because the chilling effect on free speech and press cannot easily be dismissed* and the Commission was not convinced *that the public*

benefits outweigh the costs imposed. FCC Third Report and Order, in Docket No. 17667, 64 FCC 2d 1100, at 1113-14 (1977). The Court noted that

> "… it is one thing for a broadcaster to decide independently to retain recordings of his programming; it is quite another for him to be told by Congress [or, by extension, the Commission] that … he must retain recordings and make them available to the Commission." (Bracketed material added.)

The Court also considered the noncommercial broadcasters' equal protection argument and concluded that "because no substantial governmental interest has been suggested which the distinction between commercial and noncommercial licensees is narrowly tailored to further" the statute is unconstitutional under the Fifth Amendment. However, the Court then immediately made clear its view that if the recording requirement had applied to all broadcasting, both public and commercial, it would still be unconstitutional. The Court's concluding observation in the *Community-Service* case is instructive for the required result in this proceeding:

> "If the Government can require the most pervasive and effective information medium in the history of this country to make tapes of its broadcasting for possible government inspection, in its own self-interest that medium will trim its sails to abide the prevailing winds."

593 F.2d 1102, at 1122.

Rights of Others

Finally, the Commission asks how the proposed record retention requirement might affect the rights of parties other than the broadcast licensees.

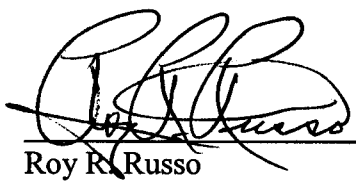
In light of the conclusions set forth above, we do not believe it is productive of the Commission's time and resources to address the ancillary issues of third-party copyright and/or contractual complications which might attend adoption of the rules proposed in the NPRM.

Conclusion

In summary, we submit that the Commission should *not* adopt the proposed recording and retention requirements, based on both the policy and the constitutional analyses set forth above. For many, particularly smaller, broadcast licensees, such a requirement would impose a financial burden which cannot be justified; the rule would of necessity be over-inclusive and would amount, in effect, to regulatory "overkill." Finally, any such requirement would certainly fail to survive the "strict scrutiny" test applied by the Court of Appeals in the *Community-Service* case and the conclusion in that case, that such a recording and retention requirement – *even when mandated by Congress* – is violative of both the First and Fifth Amendments to the United States Constitution, applies with full force to this proposal.

Respectfully submitted

COHN AND MARKS LLP (on behalf of licensees listed in Attachment A)

By: 

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Attachment A

COHN AND MARKS LLP COMMENTS ON NPRM IN MB DOCKET NO. 04-232

Licensee	**Stations**	**Recording Practice**	**Cost/Projected Cost**
Susquehanna Radio Corp. and subsidiaries.	Over 30 AM & FM stations in 7 states	No corporate-wide policy. Most stations use program logger which holds 15 days of programming.	$4,000 per station. Retention for 60-90 days would approximately double the cost.
South Dakota Board of Directors For Educational Telecommunications	9 NCE-TV/DTV Stations, 8 NCE-FM Radio Stations in South Dakota	None.	Analog TV recording would cost $8,328 for 60-day retention and $10,328 for 90-day retention. (24 hours); $7,328 for 16 hours. Digital TV would cost $41,640 for 60-day retention and $51,640 for 90-day retention (24 hours); $31,640 for 16 hours.
Alamo Public Telecommunications Council	One NCE-TV/DTV Station in Texas	No information.	No information.
Capital of Texas Public Telecommunications Council	One NCE-TV/DTV Station in Texas	Not currently recording programming. Currently broadcasting on two analog channels and four digital channels. Majority of programming during period of 6AM to 6PM is children's programs. Majority of programming after 6PM is obtained through standard PBS-oriented distribution channels. In the latter case, copies of problematic material could be obtained from PBS and other distributors if necessary. Due to nature of programming, licensee believes recording requirement is unnecessary and burdensome.	Recording would result in a significant increase in cost due to requirements for greatly increased storage capacity to maintain 16 hours of daily programming across all channels and retain that programming for 60 to 90 days.

Licensee	**Stations**	**Recording Practice**	**Cost/Projected Cost**
Golden Orange Broadcasting Co., Inc.	One TV Station in California	Syndicated programming delivered on tape and retained for more than 90 days. Local programming not recorded.	No information.
McKinnon Group	3 TV Stations in Texas and California	Occasional recordings are kept only for a few days.	No information.
University of Texas at Austin	3 NCE-FM Radio Stations in Texas	No information.	No information.
Universal Broadcasting	3 Radio Stations in New York and New Jersey	Tape solely for re-broadcast, less than 10 hours per week.	Minimal, but time, expense and staff to record and retain all programming would be a significant burden.
New Media Broadcasters, Inc.	3 Radio Stations in Montana	Records only locally-originated programming and retains for 24 hours.	Equipment cost would be $10,000 - $15,000; tape, maintenance, etc. at least $2,000 per year.
Your Christian Companion Network, Inc.	2 NCE-FM Radio Stations in California	None (religious programming).	No information.
Champion Broadcasting	One Radio Station in Massachusetts	Records occasional program on cassette and retains indefinitely.	Current cost is minimal. Cost under proposed rule would be under $6,000.

Licensee	**Stations**	**Recording Practice**	**Cost/Projected Cost**
Gospel Opportunities, Inc.	3 NCE-FM Radio Stations in Michigan	None (religious programming).	No information.
Brechner Management Co.	One TV Station in Maryland, one TV, one Radio Station in Kansas	One TV Station uses slow-scan recorder (1/3 normal speed) and retains for 90 days.	Equipment = $500. Tapes are $45 each.
R & R Broadcasting	2 AM and 2 FM Radio Stations in California	The two FM Stations tape with MP3. Files are kept approximately 90 days.	Equipment = $400. Program = $700.
Prime Time Christian Broadcasting Inc.	4 TV Stations in Texas, one TV Station in New Mexico	13 hours per week is live and taped; most tapes are indexed and retained indefinitely, some for only 90 days.	$15,000 per week for 13 hours of live material; all the rest is already being recorded.
Ector County Independent School District	One NCE-TV Station in Texas	No information.	No information.
Duquesne University	One NCE-FM Radio Station in Pennsylvania	No information.	No information.